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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAWN CORNWELL,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

AMICUS CURIAE BRIEF
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION AND INTEREST OF AMICUS

This case involves the burden that an employee must meet to prove that her employer had “knowledge” of her protected activity in order to prevail on a claim for retaliation under the Washington Law Against Discrimination (“WLAD”), ch. 49.60 RCW. The Court of Appeals held that Dawn Cornwell could not establish the causation element of her retaliation claim against Microsoft because she could not prove that the decision-makers in her case knew that a “lawsuit” she had previously pursued against Microsoft alleged claims of sex discrimination that were protected under the WLAD. Requiring an employee to prove that the decision-maker *actually knew* that the employee’s complaint was based on a protected classification recognized by the WLAD allows employers to retaliate against employees for conduct that they suspect is protected activity and that is in fact protected activity. Such a knowledge standard would be contrary to the liberal interpretation required by the WLAD, which this Court has recognized as effectuating the “highest priority” policy of promoting freedom from discrimination in employment.

The Washington Employment Lawyers Association (“WELA”) has approximately 180 members who are admitted to practice law in the State of Washington and who primarily represent employees in employment law matters. WELA advocates in favor of employee rights in recognition that

employment with dignity and fairness is fundamental to the quality of life.

WELA is a chapter of the National Employment Lawyers Association.

II. SUMMARY OF ARGUMENT

At issue in this appeal is whether Cornwell has satisfied the causation element of her retaliation claim against Microsoft – specifically, whether Cornwell put forth sufficient evidence at summary judgment for a juror to reasonably infer that the claims of discrimination that she resolved in her “lawsuit” were a substantial factor in Microsoft’s decision to give her the lowest possible score on her performance review.

The facts in this case are unique. But the problem they reflect are commonplace. Employees in the workplace routinely complain about perceived inappropriate conduct, both in writing and orally, to management in operations and Human Resources. Often those complaints contain generalize language like “harassment,” “discrimination,” “bullying,” or “unequal treatment.” But generalized “harassment” is not illegal under the WLAD, and a narrow interpretation of the complaint would foreclose protected activity because the complaint didn’t specify a protected classification. The Court should rule that as a matter of law complaints using generalized language are protected activity, and that management cannot narrowly interpret them to claim a lack of protected activity. The receipt of a complaint with generalized language triggers an obligation to comply with

the provisions of the WLAD until such time as the management determines that protected classifications are not implicated.

In her supplemental brief, Cornwell advocates persuasively that this Court should hold that a plaintiff proves knowledge where she puts forth evidence sufficient to create a reasonable inference that the decision-maker “knew or suspected” that she engaged in protected activity. The “knew or suspected” standard is mandated by the requirement that the WLAD be liberally construed to effectuate the protection of employee rights. The “knew or suspected” standard is satisfied by general notice as described above and conduct that is consistent with protected activity.¹ This Court should reverse the lower courts and remand for a trial on the merits.

III. ARGUMENT

A. Summary of facts and procedural history.

In 2005, Dawn Cornwell filed a complaint with Microsoft Human Resources alleging discrimination on the basis of sex by her manager, Todd Parsons. *See Cornwell v. Microsoft Corp.*, 199 Wn. App. 1015, at *1 (2017) (unpublished). After her attorneys threatened litigation, Cornwell and Microsoft negotiated a settlement agreement that included a confidentiality

¹ Amicus takes no position on Plaintiffs’ argument in favor of a “general corporate knowledge” standard. Amicus also does not address the situation in which an employer has a mistaken belief that the employee engaged in protected activity when she has not.

provision barring the parties from discussing the matters resolved. *Id.* Cornwell transferred to another department and continued working for Microsoft. *Id.*

Several years later, Cornwell declined an invitation by her manager, Mary Ann Blake, to mentor one of her friends. *Id.* at *2. Cornwell explained that she did not feel comfortable mentoring the friend because the friend reported to Parsons, against whom Cornwell “previously had a lawsuit.” *Id.* Blake contacted Microsoft Human Resources to “follow up” regarding the lawsuit but did not receive a substantive response about its nature. *Id.* Cornwell informed Blake that she was upset and surprised that Blake had “followed up” on her “lawsuit.” *Id.* Blake informed her manager, Nicole McKinley about Cornwell’s “lawsuit.” *Id.* Shortly thereafter, Cornwell received from Blake and McKinley the worst possible score on her performance review. *Id.* at *3. Cornwell was not informed of the low score, and Microsoft included her in a layoff. *Id.* When Cornwell later applied for another full-time position at Microsoft, the hiring manager informed her that he could not hire her because of her poor performance review. *Id.*

Cornwell filed suit under the Washington Law Against Discrimination, RCW 49.60.210, alleging that a substantial factor in the decision to give her a low rating was retaliation for filing a complaint of sex discrimination. *Id.* The Court of Appeals affirmed the trial court’s dismissal

of her claim, holding that Cornwell could not establish causation because she could not establish that the decision-makers, Blake and McKinley, knew with certainty that her “lawsuit” was based on claims of sex discrimination as opposed to a reason unprotected by the WLAD. *Id.* at *7.

B. The Washington Law Against Discrimination’s antiretaliation provision must be liberally construed.

The WLAD makes it illegal for an employer to “discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden” by the statute. RCW 49.60.210(1). This Court has repeatedly held that the WLAD must be liberally construed because freedom from discrimination is a public policy “of the highest priority.” *See, e.g., Marquis v. City of Spokane*, 130 Wn.2d 97, 109 (1996).

This Court recently made clear that a liberal construction of the WLAD is of particular importance in the retaliation context because a restrictive interpretation of an employer’s duty to avoid retaliation risks chilling employees in their efforts to report discrimination. *Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wn.2d 607 (2017). In that case, the Court disagreed with the defendant school district’s contention that the antiretaliation provision should be construed narrowly, reasoning that “[i]f prospective employers are allowed to engage in retaliatory refusals to hire, a reasonable employee might well be dissuaded from opposing

discriminatory practices for fear of being unofficially ‘blacklisted’ by prospective future employers.” *Id.* at 619.

In an effort to “erase any possible doubt” that antiretaliation provisions must be construed broadly, the Court reiterated that “[t]he overarching importance of eradicating . . . discrimination requires that WLAD’s provisions ‘be construed liberally for the accomplishment of the purposes thereof.’” *Id.* at 622 (quoting RCW 49.60.020). To accomplish that end, the Court reasoned, “if anything, antiretaliation provisions should be interpreted more broadly than provisions prohibiting discrimination based on protected characteristics in order to serve their purpose” of encouraging private individuals to enforce the WLAD. *Id.* at 623 (citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61-67 (2006)). Applying these principles, the Court held that the WLAD provides a cause of action to a prospective employee against a prospective employer that was not involved in the underlying discrimination claim. *Id.*

Consistent with the reasoning set forth in *Zhu*, the Court should broadly interpret the degree of decision-maker knowledge of protected activity that a plaintiff must prove to prevail in a retaliation claim.

C. The “knew or suspected” standard should apply to the decision-maker’s knowledge of the employee’s conduct.

Under the “knew or suspected” standard for proof of the decision-maker’s knowledge of protected activity, the employer is liable if the

plaintiff proves that the decision-makers knew or suspected that she engaged in activity protected by the WLAD, and if that activity was a substantial factor in the decision to take an adverse employment action against the plaintiff. Cornwell persuasively argued on behalf of this standard in her Supplemental Brief. *See* Petitioner’s Supplemental Brief at 6-11. Amicus here addresses the public policy arguments in favor of the “knew or suspected” standard, and Microsoft’s arguments against the adoption of that standard.

1. The “knew or suspected” standard is mandated by Washington public policy.

Adoption of a “knew or suspected” standard is necessary to promote Washington’s strong public policy to encourage employees to come forward with claims of discrimination. The WLAD places great reliance on employees “assum[ing] the role of a private attorney general” in “vindicating” the highest-priority policy of eradicating discrimination in Washington. *Marquis*, 130 Wn.2d at 109. A standard of knowledge that requires a plaintiff to prove that the employer had *actual* knowledge that she *in fact* engaged in protected activity would have a chilling effect on the motivation of any employee to engage in conduct protected under the WLAD. Employees will be less likely to complain of discrimination if any

perceived association with protected activity can leave them subject to retaliation.

Courts have recognized the importance of a “knew or suspected” standard of knowledge in enforcing antiretaliation statutes. For example, the “knew or suspected” standard applies to retaliation claims under the Occupational Safety and Health Act of 1970 (“OSHA”), 29 U.S.C. § 651, *et seq.*, which has a private-attorney-general enforcement mechanism similar to that of the WLAD.² See *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 367–68 (8th Cir. 1994); *Perez v. U.S. Postal Serv.*, 76 F. Supp. 3d 1168, 1183 (W.D. Wash. 2015) (adopting *Reich*’s “knew or suspected” standard). In holding that an employee establishes knowledge if he shows that the employer “knew or suspected” that the employee made a complaint under

² Congress passed OSHA “to assure as far as possible every working man and woman in the Nation safe and healthful working conditions” 29 U.S.C. § 651(b). The Act effectuates this goal in part by “encouraging employers and employees in their efforts” to reduce workplace hazards and by “providing for appropriate reporting procedures with respect to occupational safety and health.” *Id.* at § 651(b)(1), (10). The Act is to be liberally construed to effectuate congressional purpose. *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 368 (8th Cir. 1994) (citing *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980)). The antiretaliation provision of the Act provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U.S.C. § 660(c)(1).

OSHA, the Eighth Circuit Court of Appeals set forth the following policy rationale:

[C]ommon sense and experience establish that employers . . . make employment decisions on what they suspect or believe to be true. It would be a strange rule, indeed, that would protect an employee discharged because the employer actually *knew* he or she had engaged in protected activity but would not protect an employee discharged because the employer merely *believed* or *suspected* he or she had engaged in protected activity.

. . .

A discharge based on a belief or suspicion of protected activity is just as reprehensible as a discharge based on actual knowledge of protected activity.

. . .

It seems clear to this Court that an employer that retaliates against an employee because of the employer's *suspicion* or *belief* that the employee filed an OSHA complaint has as surely committed a violation of [OSHA's antiretaliation provision] as an employer that fires an employee because the employer *knows* that the employee filed an OSHA complaint. Such construction most definitely furthers the purposes of the Act generally and the anti-retaliation provision specifically. To hold otherwise would allow an area of employer misconduct that would surely have a chilling effect on the meaningful filing of employee complaints under the Act.

Reich, 32 F.3d 361, 367–68 (8th Cir. 1994) (emphasis in original).

The Eighth Circuit's reasoning is equally applicable to retaliation claims under the WLAD. An employer that retaliates against an employee that it suspects of filing a complaint of discrimination should be liable for retaliation just as surely as an employer that retaliates against an employee

that it knows for certain filed such a complaint. If employers can lawfully retaliate against employees based on a *suspicion* that the employee engaged in protected activity, the WLAD's antiretaliation protections will be seriously undermined.

2. Microsoft's arguments for an "actual knowledge" standard and against a "knew or suspected" standard are unavailing.

The Court should not credit Microsoft's arguments in favor of an "actual knowledge" standard for decision-maker knowledge of protected activity and against adoption of the "knew or suspected" standard.

First, and most importantly, Microsoft's position that a strict knowledge standard should apply to claims of retaliation is inconsistent with Washington public policy. A holding that employers can lawfully retaliate based on a mere suspicion that the employee engaged in protected activity risks undermining the "primary" purpose inherent in the WLAD's antiretaliation provision: "maintaining unfettered access to statutory remedial mechanisms." *Zhu*, 189 Wn.2d at 613 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)); *see id.* at 619 (recognizing that allowing prospective employers to engage in retaliatory refusals to hire would undermine the WLAD by dissuading employees from opposing discriminatory practices for fear of being "blacklisted" by prospective future employers).

Second, Microsoft's advocacy of a knowledge standard that requires evidence that the decision-maker actually knew that the employee's conduct was in fact protected does not find support in this Court's precedent. Microsoft relies on *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69 (1991) for the contention that a retaliation plaintiff must show "that the employer had knowledge of the claim." See Supplemental Brief of Respondent Microsoft Corporation at 8. The *Wilmot* Court, however, did not consider *how much* information about the plaintiff's complaint is sufficient to prove that the employer had such "knowledge." See *id.* Indeed, no decision of this Court has yet analyzed the quantum of knowledge of protected activity the employee must establish to prevail on a retaliation claim.

Third, Microsoft's contention that only an "actual knowledge" standard satisfies the requirement that retaliation be intentional is misdirected. See Supplemental Brief of Respondent Microsoft Corporation at 7-8. Under the "knew or suspected" standard, the employee must still show that his or her protected conduct was a substantial factor in the decision to take adverse action. See *Allison v. Hous. Auth.*, 118 Wn.2d 79, 95 (1991). In other words, the "knew or suspected" standard does not eliminate the requirement that the retaliation be intentional. It eliminates

only the ability for an employer to engage in intentional retaliation against an employee whom it suspects has engaged in protected conduct.

Finally, Microsoft's argument against the "knew or suspected" standard relies exclusively on distinguishing the facts of *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107 (9th Cir. 2003) from the facts of this case. See Supplemental Brief of Respondent Microsoft Corporation at 12-14. Plaintiff Hernandez filed an internal complaint with Human Resources representative Lasher, alleging that his manager, Pray, was sexually harassing a female employee, Sam. *Hernandez*, 343 F.3d at 1110. Pray was aware before he fired Hernandez that Human Resources had received a complaint that Pray had sexually harassed Sam. *Id.* at 1111. Critically, however, Pray, Lasher, and Pray's supervisor all denied that Pray knew or had been told that it was Hernandez who filed the complaint. *Id.* at 1113.

The Ninth Circuit held that Hernandez provided sufficient evidence from which a reasonable jury could infer that Pray "either knew or suspected that Hernandez had reported the alleged harassment to Lasher." *Id.* Observing that "it is frequently impossible for a plaintiff . . . to discover direct evidence contradicting someone's contention that he did not know something," the court held that a reasonable juror could infer that "once Pray learned that someone had made a harassment complaint to Lasher, he

knew or suspected that this person was Hernandez and decided to retaliate against him.” *Id.* at 1113-14.

In *Hernandez*, as in the instant case, the decision-maker had incomplete knowledge about the complaint at issue. In *Hernandez*, the decision-maker knew that a complaint of harassment had been filed but denied that he knew who had filed the complaint. Here, the decision-makers knew that Cornwell had filed a “lawsuit,” but denied that they knew anything about the underlying claims. Just as Pray’s employer could not escape liability where there was sufficient circumstantial evidence to show that Pray “knew or suspected” that Hernandez filed the complaint, so too must Microsoft face liability here, where Cornwell has proffered circumstantial evidence sufficient to show that Blake and Cornwell “knew or suspected” that Cornwell’s complaint was one of discrimination.

D. This Court should hold that generalized notice of a complaint of discrimination is sufficient to satisfy the “knew or suspected” standard as a matter of law.

This case presents an admittedly unique set of facts. Employees, however, frequently complain about workplace behavior using general language such as “harassment,” “discrimination,” “bullying,” or “unequal treatment.” An employer who receives notice of this type should, as a matter of law, be held to have “known or suspected” that the employee engaged in protected conduct. A legal standard that requires “actual knowledge” of the

precise protected nature of the employee's conduct shields the employer from liability because the employee did not use the magic words "*on the basis of my [protected class]*"—even though the complaint was *in fact* challenging conduct that would be illegal under the WLAD.

An employer should not be permitted to bury its head in the sand and retaliate against an employee who engages in conduct that is consistent with protected activity. This Court should hold that an employee is not required to use "magic words" in order to render a complaint protected under the WLAD. Rather, a decision-maker's knowledge of conduct that can implicate protected activity should establish *as a matter of law* that the decision-maker "knew or suspected" that the employee *in fact* engaged in protected activity, unless or until the decision-maker knows for certain that the employee's conduct was not protected activity. Such a standard prevents employers from hiding behind the shield of "plausible deniability" and allows the jury to decide critical issues of the decision-makers' credibility.

There is ample precedent for declining to require employees to use "magic words" to render their conduct protected. In the context of disability accommodation, for example, this Court has made clear that an employee need only give notice of her disability and limitations to trigger the employer's duty to determine the extent of the employee's disability and engage in the interactive process to identify reasonable accommodations.

Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995). The employee is not required to inform the employer of the full nature and extent of the disability, nor is he required to make an express request for accommodation. *See, e.g., Martini v. Boeing Co.*, 88 Wn. App. 442, 456-57 (1997) (employer’s awareness that employee suffered from symptoms of depression and sleep apnea sufficient to trigger duty to take positive steps to accommodate employee’s disability). Similarly, under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, the employer must engage in the interactive process when an employee requests an accommodation or if the employer recognizes that an accommodation is necessary. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc), *vacated on other grounds by U.S. Airways, Inc., v. Barnett*, 535 U.S. 391 (2002). No “magic words” are required to trigger this duty.

In cases under the Industrial Insurance Act, Title 51 RCW, this Court has recognized that “there are no ‘magic words’ for proving the issue of medical causation” in an occupational disease claim. *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 196-97 (2017). It is sufficient that a reasonable person can infer from medical testimony and lay testimony that a causal connection exists. *Id.*

In addition, under the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601, *et seq.*, the employee’s burden to provide notice does not

require the use of any specific triggering language. Rather, employees need only notify their employers that they will be absent under circumstances which indicate that the FMLA might apply. 29 C.F.R. § 825.302(c); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001). The employer's obligation to notify the employee of her eligibility to take protected leave arises when the employer "acquires knowledge that an employee's leave may be for an FMLA-qualifying reason." 29 C.F.R. 825.300(b)(1). Failure to give an employee such notice can give rise to a claim for interference. *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 144 (3d Cir. 2004).

Furthermore, a holding that a decision-maker who is aware of conduct consistent with protected activity is charged as a matter of law with "knowing or suspecting" protected activity is consistent with precedent holding defendants liable for acting with reckless disregard for a known risk. For example, a public figure plaintiff prevails in a defamation case by proving that the defendant acted with "actual malice" by making a false statement either with knowledge that the statement is false or with reckless disregard as to its falsity. *Duc Tan v. Le*, 177 Wn.2d 649, 669 (2013). Recklessness is also recognized as a standard for enhanced liability in federal employment law. Under Title VII, for example, punitive damages are available to employees who prove that the employer acted "in the face

of a perceived risk that its actions will violate federal law.” *Kolstad v. American Dental Association*, 527 U.S. 526 (1999); 42 U.S.C. § 1981a(b)(1) (holding punitive damages are available where the employee demonstrates that the employer engaged in a discriminatory practice “with reckless indifference” to the employee’s rights under Title VII).

The Court should, therefore, hold that, a retaliation plaintiff proves her case if she shows that the decision-maker was aware of or suspects that she engaged in conduct consistent with protected activity, that her conduct was a substantial factor in the decision to take adverse action, and that her conduct was in fact protected activity.

E. The Court should hold, applying these standards, that Cornwell’s claims survive summary judgment. The Court should reverse the Court of Appeals and remand this case for trial on the merits.

The standard of causation for WLAD antiretaliation claims is whether “retaliation was a substantial factor behind the [defendant’s] decision.” *Allison v. Hous. Auth.*, 118 Wn.2d 79, 95 (1991). The Supreme Court recently reiterated that an employee need only prove that the protected activity was a cause, not the sole cause, of the employer’s termination, and the employee may do so by circumstantial evidence. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 314 (2015)).

In this case, the Court of Appeals held that Petitioner could not satisfy her burden on causation because the evidence was insufficient to

create a reasonable inference that Blake and McKinley *actually knew* that Cornwell's "lawsuit" was protected activity. Because the evidence, viewed in the light most favorable to Cornwell, is sufficient to demonstrate that Blake and McKinley knew or suspected that Cornwell engaged in activity that was protected under the WLAD, this court should reverse the Court of Appeals and remand this case for trial.

This is not a case in which the decision-makers were entirely unaware of the plaintiff's protected activity. To the contrary, Blake and McKinley were aware that Cornwell had a prior "lawsuit" against Microsoft; that the "lawsuit" had been settled; that the settlement terms were confidential; and that the settlement limited Cornwell's ability to continue working with her male former manager. Furthermore, Blake asked Microsoft Human Resources for more information about the "lawsuit," but did not receive a substantive response.

These facts implicate conduct that is consistent with the filing of legal claims under the WLAD. Although Blake and McKinley were aware of Cornwell's "lawsuit" and partially aware of the effects of its settlement, they testified that they did not know for certain that her "lawsuit" involved a claim of sex discrimination under the WLAD. But clearly, a jury could reasonably infer that they suspected protected activity. Otherwise, they

wouldn't have contacted Human Resources to inquire about the details of the "lawsuit."

The fact that Cornwell had settled a "lawsuit" that implicated her former male manager should have put Blake and McKinley on notice that her "lawsuit" may in fact have involved protected activity, regardless of whether Blake and McKinley knew that the conduct was in fact protected under the WLAD. Thus, as a matter of law, Blake and McKinley "knew or suspected" that the "lawsuit" involved activity protected by the WLAD. Cornwell prevails if she proves that the "lawsuit" was substantial factor in the decision to give her the lowest performance rating.

IV. CONCLUSION

This Court should hold that a plaintiff proves her retaliation claim under the WLAD if she establishes that the decision-maker knew or suspected that she engaged in protected conduct and that her conduct was a substantial factor in the decision to take an adverse action against her. The knew or suspected standard is satisfied by a complaint with general language which potentially implicates protected activity; no magic words are required.

This Court should reverse the Court of Appeals' decision and remand this case for trial on the merits.

Respectfully submitted this 30th day of April, 2018.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

A handwritten signature in blue ink, appearing to be 'Ch' followed by a long, sweeping horizontal stroke.

By:

Jeffrey Needle, WSBA # 6346
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CERTIFICATE OF SERVICE

I, Kathleen Kindberg, certify and state as follows: I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104. I electronically filed and caused to be served upon counsel of record as listed below, on April 30, 2018, the foregoing document:

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I hereby declare under the penalty of perjury of the laws of the
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DATED this 30th day of April, 2018 at Seattle, Washington.

/s/Kathleen Kindberg

Kathleen Kindberg

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